**IN THE HIGH COURT OF JUDICATURE OF BOMBAY**

**CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.929 OF 2003

Narendra @ Narya Kishanpal Aarnol. ..Appellant.

V/s.

The State of Maharashtra. ..Respondent.

Mr.Punit Mahimkar for Ms. Glady Pereira for Appellant.

Mr.S.S.Tatkare, APP for Respondent.

**CORAM: A.M.KHANWILKAR,J**

**DATE : AUGUST 18, 2006.**

**ORAL JUDGMENT :**

1. This appeal takes exception to the Judgment and order passed by the Ad-hoc Additional District and Sessions Judge, Thane dated June 17, 2003 in Sessions Case No.146 of 2003.

2. The appellant was charge-sheeted and tried for offence punishable under section 302, 201 r/w. 34 of the I.P.Code alongwith one Ramashray Hiraram Sharma-Accused No.2.

3. The prosecution case is that the appellant alongwith accused No.2, on his own came to the Kalwa Police Station, on 19th December, 2002, and made disclosure that he had murdered Ajay @ Shivkumar

Singh and his dead body was dumped in an open tank in the compound of Mafatlal and Company which comes within the jurisdiction of Kalwa Police Station. It is alleged that the appellant disclosed to (P.W.4)Ashok-Police Officer on duty at the relevant time, that deceased Ajay refused to share the sale proceeds of junk collected by them and on account of which dispute arose, which resulted in altercation. That the appellant assaulted the deceased resulting in severe injuries to which the deceased succumbed. Thereafter, the appellant dumped the body of the deceased in an open tank in the compound of Mafatlal and Company. On the basis of information so given by the appellant himself, FIR was registered on 19th December, 2002 and investigation commenced.

4. In view of the disclosure made that the dead body of the victim has been dumped in an open tank in the compound of Mafatlal and Company, the concerned police officer called for two panchas and also simultaneously informed the Fire Brigade to take search of the dead body in the said tank. The panchas alongwith accused went to the said tank, when the Fire Brigade personnel removed the dead body from the tank which was packed in a gunny bag. The appellant removed the dead body from the said gunny

bag. These facts are proved by the prosecution by examining in all four witnesses. P.W.-1 Mangesh is a Panch witness who had attended the discovery procedure of the dead body at the instance of appellant. P.W.2 Anil is panch witness regarding inquest panchanama drawn by the officer. P.W.3 Sandeep is the second panch witness, who had attended the discovery procedure of the dead body at the instance of appellant. P.W.4 Ashok was the investigating officer. The trial Court on analysing the evidence on record has noted that the deceased suffered homicidal death. In so far as the fact whether the appellant was responsible for the death of deceased, the trial court has noted that the disclosure made by the appellant regarding dead body and recovery of the dead body at the instance of the appellant was admissible evidence as per section 27 of the Evidence Act. In paragraph-9 of the Judgment, the trial Court has then observed that, true it is that strictly the fact of killing or belabouring the victim named in information cannot be said to have been discovered. However, the trial Court has not elaborated as to in what manner the prosecution has established the fact of murder committed by the appellant by killing or belabouring the victim. In absence of such finding, it was not open to record

finding of guilt against the accused with regard to the alleged offence.

5. Be that as it may, the trial Court on the basis of discovery under section 27 of the Evidence Act, of the dead body of the deceased at the instance of the appellant, proceeded to record finding of guilt against the appellant. However, the trial Court has then examined the question of nature of offence and took the view that having regard to the fact that it cannot be said that the appellant had intention either to finish the victim or even cause such injury to him, which may cause death in an ordinary course. This view is taken even though about 19 injuries including fracture were noticed on the person of the deceased. The trial Court accordingly held that the case was covered under section 304(I) of the I.P.Code and not under section 302 thereof. On that finding, the trial Court proceeded to order that the appellant shall undergo imprisonment for a period of five years. The trial Court has then, in the operative order noted that, the appellant is acquitted of the offence under section 302 and 201 of the I.P.Code.

6. In so far as co-accused Ramashray Hiraram

Sharma-Accused No.2 is concerned, the Court has found that no evidence was forthcoming to establish his complicity in the commission of the alleged offence. On such finding the trial Court proceeded to acquit Accused No.2 of all the charges. The finding recorded by the trial Court in favour of the Accused No.2 or for that matter Accused No.1 has not been challenged by the State. Whereas, the present appeal is filed by Accused No.1 challenging the finding of guilt as well as the conclusion that the appellant was guilty of offence under section 304(I) of I.P.Code.

7. Counsel for the appellant would contend that in the fact situation of this case it was not open to record finding of guilt against the appellant at all. This is so because, the only evidence, that has come on record at the instance of the prosecution, which can be said to be admissible legal evidence, is about the disclosure made by the appellant of one dead body having been dumped in the open tank and discovery of the said dead body from that tank at the instance of the appellant. Even if the said discovery is to be accepted as it is, there is no legal evidence on record that the appellant was responsible for the death of the said person or that the said Ajay @

Shivkumar Singh has in fact been murdered or for that matter the dead body was of Ajay @ Shivkumar Singh. It is argued that no other statement or confession made by the appellant before the police officer will be of any avail or can be used against the appellant as such. That no effort has been made by the prosecution to collect or adduce evidence to establish the fact that one Ajay @ Shivkumar Singh has been murdered and the appellant was responsible for the same and that the dead body recovered from the tank was of none other than of said Ajay @ Shivkumar Singh. Besides, it is contended that except the disclosure made by the appellant, no other evidence has been collected or brought on record by the prosecution to establish the link of circumstances, which would lead to the inevitable conclusion that the appellant was guilty of the alleged offence. There is no evidence that there was any enmity between the appellant and deceased Ajay. There is no legal evidence to establish motive. There is also no evidence that the appellant and deceased Ajay were of close acquaintance or were seen moving together, much less last seen together. On this submission, it is contended that the finding of guilt recorded by the lower Court even in respect of offence under section 304(I) of the I.P.C. cannot be

sustained.

8. Having considered the rival submissions and after going through the evidence on record, I am in agreement with the submissions made on behalf of the appellant. For the nature of evidence on record, it was not open to the trial Court to record finding of guilt against the appellant even in respect of offence under section 304(I) of the I.P.Code. This is so because there is absolutely no legal evidence to establish the complicity of the appellant in the commission of murder of Ajay @ Shivkumar Singh, except the evidence of Investigating Officer and the panchas, which, even if accepted as it is, would only indicate that discovery of dead body of some person from the open tank in the compound of Mafatlal & Co. was made at the instance of the appellant. That fact cannot be the basis to authoritatively conclude that the appellant was responsible for killing and belabouring the victim known as Ajay @ Shivkumar Singh. At best, the appellant can be proceeded with regard to the offence under section 201 of the I.P.Code on the basis of such evidence. I shall deal with that aspect a little later. Suffice it to observe that as the prosecution has not brought on record any evidence or legal evidence to establish

any motive or existence of enmity between the deceased and accused or for that matter close acquaintance of the appellant and the deceased Ajay or that they were seen moving together, much less last seen together, it is incomprehensible that finding of guilt even in respect of offence under section 304(I) can be recorded against the accused. The trial Court having rightly observed in paragraph-9 that the fact established on the basis of legal evidence on record cannot strictly prove the fact of killing or belabouring the victim by the appellant, committed manifest error in recording finding of guilt against the appellant for the commission of the alleged offence. In fact, the observation made in para-9 is consistent with the mandate of section 25 of the Evidence Act, which postulates that no confession made to a police officer shall be proved as against a person accused of any offence. Section 26 however, provides that no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Section 26 is therefore, exception to the general rule prescribed by section 25 of the Evidence Act. In the present case, the appellant was not produced before the Magistrate nor

it is the prosecution case that the information recorded by the police officer was on the basis of disclosure made by the appellant in the presence of Magistrate. Section 27 of the Evidence Act is also exception to the general rule spelt out in section 25 of the Act. It provides that when any fact is deposed to as discovered in consequences of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates to the fact thereby discovered, may be proved. The Court below has rightly noted that on the basis of section 27 of the Evidence Act, the fact that has proved by the prosecution is only regarding the discovery made of a dead body from the open tank at the instance of the appellant. No more and no less. That however, does not mean that the chain of circumstances leading to the inevitable conclusion that the appellant was responsible for the death of the deceased can be said to have been established by the prosecution. In such a case, therefore, finding of guilt even under section 304(I) I.P.Code as recorded by the trial Court cannot be sustained.

9. The next question is whether the appellant

could have been found guilty of the offence under section 201 of I.P.Code on the basis of discovery of dead body of deceased at the instance of the appellant, which would persuade the court to infer that the appellant had caused disappearance of evidence of a serious offence by dumping the dead body in a gunny bag in the open tank in the compound of Mafatlal and Company. In the first place, the trial Court has already acquitted the appellant of the charge of Section 201 of I.P.Code though the appellant was charged of that offence in the charge as framed. Assuming that this court was required to go into the question as to whether the appellant can be found guilty of offence under section 201 of I.P.Code, as mentioned earlier there is absolutely no evidence collected by the prosecution or brought on record to establish the fact that the dead body recovered from the tank at the instance of the appellant was of Ajay @ Shivkumar Singh. This was necessary as the appellant was tried for offence in relation to the death of deceased Ajay @ Shivkumar Singh. Unless that fact was to be established the appellant cannot be found guilty of offence under section 201 of I.P.Code of causing disappearance of the dead body of some person other than Ajay @ Shivkumar Singh as such. The dead body found at the

instance of the appellant if pertains to some other person, the appellant cannot be found guilty for causing disappearance of dead body of deceased Ajay and to convict him on that basis. In any case, the State has not challenged the finding recorded by the trial Court in relation to offence under Section 201 I.P.Code. Therefore, it is not necessary to elaborate on this aspect any further.

10. Accordingly, this appeal succeeds. The impugned Judgment and Order is set aside. The appellant is acquitted of the offence punishable under section 304(I) of the I.P.Code. The appellant is directed to be set at liberty forthwith.

11. While parting the Court expresses a word of concern for the shaddy investigation done in this case. Copy of this order be forwarded to the Secretary, Home Department, Government of Maharashtra for necessary action.

12. All concerned to act on the copy of the operative order passed by this court to be issued duly authenticated by the office.